## INDEX

Page

STATEMENT OF THE CASE..... 1
ARGUMENT:

PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE FEDERAL COURTS LACKED JURISDICTION OF PETITIONERS' CLAIMS AND PETITIONERS HAVE FAILED TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED .....1-9

CONCLUSION ..... 9

### CASES

Alvarez v. Pan-American Life Insurance Co., 375 F.2d 992 (5th Cir. 1967) *cert. denied,* 389 U.S. 827 (1967) ..... 4

Board of Commissioners of Pawnee County, Okl. v. United States, 139 F.2d 248 (10th cir. 1943) *cert. denied,* 321 U.S. 795 (1944) ..... 6

Cantor v. Supreme Court of Pennsylvania, 353 F. Supp. 1307 (E.D. Pa. 1973), *aff'd* 487 F.2d. 1394 (3d Cir. 1973) ..... 5

Denver Bar Association v. Public Utilities Commission, 154 Colo. 273, 391 P.2d 467 (1964) ..... 8

Ex Parte Poresky, 290 U.S. 30 (1933) ..... 5

Ford Motor Company v. Department of Treasury of Indiana, 323 U.S. 459 (1945) ..... 6

Healy v. Ratta, 292 U.S. 263 (1934) ..... 3

Henneford v. Northern Pacific Railway Co., 303 U.S. 17 (1938) ..... 3

Johnson v. New York State Education Department, 319 F. Supp. 271 (E.D.N.Y. 1970), *aff'd* 449 F.2d 871 (2d Cir. 1971) ..... 4

Jones v. North Bergen, 331 F. Supp. 1281 (D.N.J. 1971) 4

## INDEX

Page

Lathrop v. Donohue, 367 U.S. 820 (1961) *reh. denied*, 368 U.S. 871 (1961) ..... 5, 8, 9
Levering v. Garrigues Company v. Morrin, 289 U.S. 103 (1933) ..... 5
McNutt v. General Motors Acceptance Corporation, 298 U.S. 178 (1936) ..... 3
Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1903) ..... 5
Parden v. Terminal R. of Alabama State Docks Department, 377 U.S. 184 (1964), *reh. denied* 377 U.S. 1010 (1964) ..... 6, 7
People v. Herrera, _____Colo._____, 516 P.2d 626 (1973) ..... 8
Reed v. Reed, 404 U.S. 71 (1971) ..... 9
Rogers v. Hennepin County, 239 U.S. 621 (1916)..... 4
Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969) ..... 8
Snyder v. Harris, 394 U.S. 339 (1969), *reh. denied* 394 U.S. 1025 (1969) ..... 4
Sweezy v. New Hampshire, 354 U.S. 234 (1957), *reh. denied* 355 U.S. 852 (1957) ..... 7, 8

### RULES

Colo. R. Civ. Proc. 227 ..... 1, 7
Fed. R. Civ. P. 23 ..... 3, 4

### STATUTES

28 U.S.C. § 1257 (2) ..... 9
28 U.S.C. § 1331 ..... 2
28 U.S.C. § 1341 ..... 2, 5, 6
28 U.S.C. § 1343 ..... 2, 5, 6

No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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**THOMAS M. MAY and DAVID C. VIGIL, for themselves and on behalf of all others similarly situated,**

*Petitioners,*

*v.*

**THE SUPREME COURT OF THE STATE OF COLORADO, THE JUSTICES OF THE SUPREME COURT OF THE STATE OF COLORADO, THE CLERK OF THE SUPREME COURT OF THE STATE OF COLORADO, THE STATE COURT ADMINISTRATOR OF THE STATE OF COLORADO,**

*Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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### STATEMENT OF THE CASE

Petitioners, Thomas M. May and David C. Vigil, attorneys licensed to practice law in Colorado, brought this action in the federal district court for the district of Colorado seeking to have Colorado Rule of Civil Procedure 227, which imposes a twenty dollar registration fee on attorneys licensed to practice in Colorado, declared uncon-

stitutional and to enjoin the respondents, the Supreme Court of Colorado, its justices, clerk and the state court administrator, from enforcing the fee requirement and the penalty of suspension for noncompliance.

The district court found that it lacked subject matter jurisdiction, and even assuming jurisdiction, that the petitioners had failed to state a claim on which relief could be granted, and dismissed the action. The Tenth Circuit Court of Appeals affirmed. Petitioners seek a writ of certiorari to review the decision of the court of appeals.

## ARGUMENT

### PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE FEDERAL COURTS LACKED JURISDICTION OF PETITIONERS' CLAIMS AND PETITIONERS HAVE FAILED TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

Petitioners assert three separate statutory bases for invoking the jurisdiction of the federal courts: 28 U.S.C. § § 1331, 1341 and 1343.

Section 1331 is, of course, the federal question section. It requires that petitioners' claim arise under the constitution or laws of the United States and that the amount in controversy exceed $10,000. The district court found that petitioners had failed to allege the requisite amount in controversy, and that as a result it was without subject matter jurisdiction to entertain the action. The court of appeals agreed.

The opinion of the district court indicates that the court, on its own motion during the course of oral argument, raised the question as to whether the jurisdictional amount had been met. The court is, of course, empowered to review the question of jurisdiction at any point in the proceedings, and to do so on its own motion if necessary. *McNutt v. General Motors Acceptance Corporation,* 298 U.S. 178 (1936). In response to the court's inquiry, petitioners' counsel stated that the basis for petitioners' allegation that the jurisdictional requirement had been met was that petitioners' failure to pay the twenty dollar fee would result in their suspension from law practice and that the damages arising from such suspension would exceed $10,000.

As the district court stated in its opinion, "Examination of the case law reveals the great weight of authority to be that in suits to enjoin enforcement of taxes and license fees, the amount in controversy is the amount of the tax or fee imposed and not the damage or loss which will be incurred by failure to pay the fee." Petitioners' Appendix A, p. 18. Both the district court and the court of appeals properly relied on *Healy v. Ratta,* 292 U.S. 263 (1934) and *Henneford v. Northern Pacific Railway Co.,* 303 U.S. 17 (1938) to support their conclusion that the amount in controversy was the amount of the tax imposed and not the loss resulting from failure to pay the fee. We agree that those cases compel the conclusion reached by the district court that it lacked subject matter jurisdiction to entertain petitioners' case.

Although the district court did not rule on petitioners' contention that they represent a class of similarly situated individuals under Fed. R. Civ. P. 23 because of its holding

that it lacked subject matter jurisdiction and that no claim on which relief could be granted was shown, the designation of petitioners as representatives of a class would not serve to establish the required $10,000 amount because under the weight of authority, petitioners and those whom they claim to represent, would not be entitled to aggregate their claims in order to achieve the jurisdictional amount.

Despite the 1966 amendment eliminating the distinctions between "true", "hybrid" and "spurious" class actions, the rules regarding aggregation of claims to meet the jurisdictional amount have not changed. *Snyder v. Harris,* 394 U.S. 332 (1969), *reh. denied* 394 U.S. 1025 (1969); *Alvarez v. Pan-American Life Insurance Co.* 375 F.2d 992 (5th Cir. 1967) *cert. denied,* 389 U.S. 827 (1967). The uniform rule is that where the purpose of a suit is to enjoin the levy, assessment or collection of taxes or fees, the claim of each member is separate from the others, and the claims may not be aggregated to satisfy the jurisdictional amount. *Rogers v. Hennepin County,* 239 U.S. 621 (1916); *Jones v. North Bergen,* 331 F. Supp. 1281 (D.N.J. 1971); *Johnson v. New York State Education Department,* 319 F. Supp. 271 (E.D.N.Y. 1970), *aff'd* 449 F.2d 871 (2d Cir. 1971) *vacated and remanded on other grounds,* 409 U.S. 75 (1972). Thus even if petitioners' action were designated as a proper class action, the jurisdictional amount would not be met.

We submit that the district court lacked subject matter jurisdiction under section 1331 for an additional reason. Although petitioners' claims ostensibly arise under the fourteenth amendment to the United States Constitution, the allegations are so plainly unsubstantial and obviously without merit, that dismissal on the ground of lack of

subject matter jurisdiction was justified. *Newburyport Water Co. v. Newburyport,* 193 U.S. 561 (1903); *Ex Parte Poresky,* 290 U.S. 30 (1933). To invoke the jurisdiction of the federal courts, a substantial federal claim is required. *Levering & Garrigues Company v. Morrin,* 289 U.S. 103 (1933). If this were not the rule, the federal courts would be flooded with litigants who had phrased their allegations in terms of due process or equal protection.

Where an allegation is clearly foreclosed by a previous decision of this court, no substantial federal question exists. *Levering, supra,* 289 U.S. at 105-6. In the instant case, the question of the constitutionality of the imposition of an attorney registration fee was settled in *Lathrop v. Donohue,* 367 U.S. 820 (1961), *reh. denied* 368 U.S. 871 (1961), where a clear majority of the court upheld the constitutionality of requiring attorneys licensed to practice law in Wisconsin to pay an annual dues fee of fifteen dollars. See also *Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307 (E.D. Pa. 1973), *aff'd* 487 F.2d 1394 (3d Cir. 1973).

Petitioners also invoke the jurisdiction of the federal courts under 28 U.S.C. § § 1341 and 1343. Section 1343(3) gives the district courts original jurisdiction of actions to redress violations, under color of state law, of rights guaranteed by the United States Constitution or by acts of Congress providing for equal rights. Actions properly invoking section 1343 are exempt from the requirement of the jurisdictional amount. What we have said about the insubstantiality of the petitioners' federal question claim under section 1331, however, applies with equal force here. If that claim fails for lack of a substantial federal question,

then so must petitioners' attempt to invoke jurisdiction under section 1343.

Finally, petitioners' attempt to invoke the federal court's jurisdiction under section 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Like the district court, we are somewhat puzzled by petitioners' reliance on this section. The purpose of this section is to limit the number of suits brought by private citizens to enjoin state officers from enforcing state laws where jurisdiction is otherwise vested by federal question or diversity standards. *Board of Com'rs. of Pawnee County, Okl. v. United States,* 139 F.2d 248 (10th Cir. 1974) *cert. denied,* 321 U.S. 795 (1944). Thus, as the court of appeals in the instant case pointed out, "Section 1341 does not operate to confer jurisdiction but instead limits jurisdiction which might otherwise exist." Petitioners' Appendix B, pp. 28-9.

For the reasons stated above, the district court lacked subject matter jurisdiction to entertain petitioners' claim both because the requisite jurisdictional amount was not met and because no substantial federal question was involved. In addition, there is some authority for the proposition that petitioners were barred by the doctrine of sovereign immunity from pursuing their claims. *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945); *Parden v. Terminal R. of Alabama State Docks Depart-*

*ment*, 377 U.S. 184 (1964), *reh. denied* 377 U.S. 1010 (1964). This view was adopted by Judge Barrett, in his concurring opinion to the decision reached by the Tenth Circuit Court of Appeals in the case now at issue.

Even if we were to assume that the district court had jurisdiction to entertain petitioners' claims, petitioners failed to state a claim on which relief could be granted, and the action was therefore properly dismissed. Petitioners allege two grounds on which their constitutional rights have been violated: 1) that they have been denied due process because of the alleged usurpation of legislative powers by the judiciary in levying a "tax" on them, and 2) that the imposition of the "tax" invidiously discriminates against them and hence violates their rights to due process and equal protection under the fourteenth amendment.

Petitioners' first contention is based on the theory that there is a federally protected right to a state government based on the doctrine of separation of powers. Petitioners argue that the Colorado constitution, article 3 compels the separation of powers among the three branches of government; that the Colorado Supreme Court has "usurped" the legislative function by imposing a "tax" on attorneys by Colo. R. Civ. P. 227, and that this alleged violation of the Colorado constitution denies petitioners their rights to due process under the fourteenth amendment.

Petitioners concede, as they must, that "the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), *reh. denied*

355 U.S. 852 (1957). See also *Snell v. Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U.S. 323 (1969). But they argue, on the basis of *Sweezy,* that in a particular instance, due process may be denied by interference with a state-mandated separation of powers scheme.

We do not concede that article 3 of the Colorado constitution providing for a government of separation of powers has been violated in the instant case. Petitioners rely on *People v. Herrera,* _____ Colo. _____, 516 P.2d 626 (1973), in which the Colorado Supreme Court invalidated a statute giving the courts power to commute the sentences of convicted criminals on the ground that the statute invaded a function granted by the constitution to the governor and thus violated the principle of separation of powers. The instant case is clearly distinguishable on its facts.

The doctrine of separation of powers supports the action of the supreme court in promulgating and enforcing Colo. R. Civ. P. 227. It is well established that the Colorado Supreme Court has exclusive power to define and regulate the practice of law, including the power to regulate admission and the right to discipline. *Denver Bar Association v. Public Utilities Commission,* 154 Colo. 273, 391 P.2d 467 (1964). Since the fees collected under Rule 227 are used to support the disciplinary machinery, the supreme court was well within the powers granted to it by the constitution in adopting and administering such a rule.

This court in *Lathrop, supra,* implicitly approved action taken by the state judiciary which was arguably legislative in character. In holding that a Wisconsin Supreme Court order integrating the bar of that state under rules

promulgated by the court was a "statute" for purposes of 28 U.S.C. § 1257(2) which authorizes review by appeal of state court judgments drawing into question the validity of a state statute, the court stated, "We are satisfied that this appeal is from an act *legislative in nature* and within § 1257(2)." 367 U.S. at 825 (emphasis added). This court was clearly not disturbed then, as it should not be now, by the exercise by a state supreme court of a function relegated to it under state law and upheld the action taken by the supreme court even though it was arguably legislative in character.

Petitioners also contend that the imposition of the "tax" violates their rights to due process and equal protection by invidiously discriminating between attorneys who pay the fee and those who do not. We agree with the court of appeals that "this claim is patently without merit." Petitioners' Appendix B, p. 31. It is elementary that the fourteenth amendment does not prohibit all classifications, but only those which bear no reasonable relation to a legitimate state purpose. *Reed v. Reed,* 404 U.S. 71 (1971). The improvement of the ethical standards of the bar and the quality of available legal services clearly constitutes a valid state purpose. *Lathrop, supra.* Since the registration fee is a reasonable one, and is rationally related to a valid state purpose, it does not offend the fourteenth amendment.

For the reasons stated above, even if jurisdiction under section 1343 were assumed, petitioners have failed to state a claim on which relief could be granted under that section.

## CONCLUSION

Petitioners claim was properly dismissed for want of subject matter jurisdiction and for failure to state a claim on which relief could be granted. Petitioners have failed to allege any reason entitling them to a writ of certiorari from this court. We therefore respectfully request that petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have in compliance with United States Supreme Court Rule 33, para. 3(b) this 23rd day of May, 1975, deposited three copies of the foregoing Brief in Opposition to Petition for Certiorari in the United States Mails, first class postage prepaid, and addressed to:

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